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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION ONE

CENTINELA-FREEMAN EMERGENCY MEDICAL ASSOCIATES et al., Plaintiffs and Appellants, v. HISPANIC PHYSICIANS IPA MEDICAL CORPORATION, Defendant and Appellant.	B258015 (Los Angeles County Super. Ct. No. BC475783)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruth Ann Kwan, Judge. Affirmed.

Ronald S. Marks and Alexander W. Kirkpatrick for Defendant and Appellant.

Michelman & Robinson, Andrew H. Selesnick, Damaris L. Medina, and Robin James for Plaintiffs and Appellants.

This appeal concerns a commercial dispute between 10 emergency physician medical groups (collectively, Centinela)[1] and an independent practice association, Hispanic Physicians IPA Medical Corporation (HPI). Although no contract existed between the parties, Centinela's physicians were often required to provide emergency medical services to HPI's patients. Consequently, a dispute arose between the parties over the reimbursement value of those services (the case rate).

The parties not only differed over what the case rate should be (Centinela argued that it should $350, while HPI contended that it should $150), but they also differed over the proper method for determining the case rate. HPI maintained that the case rate should bear a "close relationship" with reimbursement rates paid by Medicare

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[1] Those medical groups are as follows: Centinela-Freeman Emergency Medical Associates; Chino Emergency Medical Associates; Hollywood Presbyterian Emergency Medical Associates; Montclair Emergency Medical Associates; Sherman Oaks Emergency Medical Associates; Tarzana Emergency Medical Associates; Valley Emergency Medical Associates; Valley Presbyterian Emergency Medical Associates; West Hills Emergency Medical Associates; and Westside Emergency Medical Associates.

and, more specifically, that the case rate should be 120 percent of Medicare's rate for a given service, which is the reimbursement rate that HPI used for claims from other emergency physician groups. Centinela, in contrast, argued that the case rate should be determined by reference to the so-called *Gould* factors. The *Gould* factors were first articulated in *Gould v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1059, 1071 (*Gould*) and then subsequently adopted by the Department of Managed Health Care (DMHC) and set forth in section 1300.71, subdivision (a)(3)(B) of title 28 of the California Code of Regulations (the *Gould* factors or Regulation 1300.71(a)(3)(B)).[2]

The parties ultimately submitted their dispute over the proper case rate to binding arbitration, but preserving their

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[2] Under Regulation 1300.71(a)(3)(B), " 'Reimbursement of a Claim' " means: "For contracted providers without a written contract and non-contracted providers . . . the payment of the reasonable and customary value for the health care services rendered based upon statistically credible information that is updated at least annually and takes into consideration: (1) the provider's training, qualifications, and length of time in practice; (ii) the nature of the services provided; (iii) the fees usually charged by the provider; (iv) prevailing provider rates charged in the general geographic area in which the services were rendered; (v) other aspects of the economics of the medical provider's practice that are relevant; and (vi) any unusual circumstances in the case."

right to appellate review for "[e]rrors of law and substantial errors of fact" pursuant to *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334 (*Cable Connection*). The arbitrator ruled in favor of Centinela, fixing the case rate at $350, and, in addition, awarded Centinela its cost of proof—that is, its attorney fees and costs connected with the case rate dispute. Although the trial court subsequently affirmed the award on the merits of the case rate dispute, it vacated the attorney fees award, ruling that such an award was beyond the arbitrator's jurisdiction. Both parties appealed.

On appeal, HPI makes three principal assertions: the arbitrator applied the incorrect legal standard; the evidence submitted in the arbitration does not support $350 as a reasonable case rate; and the arbitrator wrongfully excluded the amended report of one of HPI's experts. For its part, Centinela argues that the trial court erred with respect to the attorney fees award—although the parties' agreement to arbitrate is silent on the issue of the arbitrator's power to award attorney fees in connection with determining the proper case rate, the arbitrator had the power to make such an award because such a decision was inextricably bound up with the case rate dispute and its resolution.

As discussed below, we disagree with both parties and, accordingly, affirm the judgment.

BACKGROUND

I. The Case Rate Award

Centinela filed suit against HPI in December 2011, alleging four causes of action: quantum meruit; unfair competition under Business and Professions Code section 17200 et seq.; open book account; and services rendered. In both its initial complaint and in its operative first amended complaint, Centinela alleged that HPI purportedly "violated, and continues to violate, its statutory obligations to reimburse [Centinela] in reasonable amounts under California Health & Safety Code § 1371.4(b) and [Regulation 1300.71 (a)(3)(B)]" and that HPI "failed and continues to fail, to consider and weigh each of the relevant factors [set forth in Regulation 1300.71(a)(3)(B)] in determining reasonable reimbursement appropriately, as demonstrated by its arbitrary and unreasonable payments."

A. *The agreement to arbitrate the case rate dispute*

In December 2012, a year after filing suit, Centinela entered into an agreement with HPI settling many of its claims. However, with regard to the parties' dispute over the proper case rate for the period January 14, 2012 to December 10, 2015, the parties stipulated to submit that dispute to binding arbitration.

The parties' arbitration agreement provided, inter alia, that the "parties may argue to the arbitrator whatever case rate they believe should apply. But if the arbitrator awards a rate higher than $350, then it shall be adjusted to [$]350. If below $150, it will be adjusted to [$]150. [¶] If the

arbitrator awards an amount between $350 and $150, it shall remain without adjustment."

The parties did not require that the arbitrator provide in his statement of decision a detailed evaluation of all of the evidence presented at the arbitration hearing. Instead, the parties merely agreed that the "arbitrator's decision shall be in writing and shall state the factual and legal grounds for the decision."

Although the parties agreed that "[e]rrors of law and substantial errors of fact" may be reviewed in accordance *Cable Connection*, *supra*, 44 Cal.4th 1334, and although they agreed to split the arbitrator fees evenly between them, the parties made no provision in their arbitration agreement to pay for a court reporter to transcribe the arbitration hearing. The parties agreed that the arbitrator could award a party its attorney fees and costs but only in connection with accounting disputes arising after the case rate had been determined.

B. *The arbitrator's exclusion of an amended report by HPI's expert*

On November 26, 2012, Centinela deposed one of HPI's experts, Dona M. Hall (Hall), the owner of a physician management and medical billing company in Southern California. One of the exhibits to Hall's deposition was an "Expert Witness Disclosure," which contained a report by Hall dated September 11, 2012 (Hall's original report). Each page of the report was marked "DRAFT." Hall testified that she did not have a final version of her report at the time of

her deposition, and that the draft report did not include all of her opinions in this case. Hall further testified that the draft report "could be expanded" to encompass her review of additional records, and that she had made "additional calculations" since completing the draft report.[3]

On May 24, 2013, six months after being deposed and four days before the arbitration hearing, Hall submitted an amended expert report to HPI's counsel (Hall's amended report). On that same day, the parties submitted a joint exhibit list to the arbitrator. Exhibit No. 50 on the joint list was identified as "Report of Dona M. Hall."

On May 27, 2013, three days after receiving Hall's amended report and one day before the arbitration was scheduled to begin, counsel for HPI emailed its exhibits to counsel for Centinela. However, instead of transmitting both Hall's original and amended reports to Centinela, HPI sent only Hall's original report.

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[3] In addition to admitting that that her opinions were only preliminary in nature, Hall also admitted in her deposition that she had little experience with emergency physician billing issues. Although her medical billing/management company negotiates contracts on behalf of physicians, she admitted she had never negotiated a contract on behalf of an emergency physician group or a contract with an emergency physician group on behalf of a payor. She admitted further that she never had an emergency physician group as a client.

On May 28, 2013, the first day of the arbitration hearing, HPI sought to introduce Hall's amended report. Centinela objected, claiming that it was being "sandbagg[ed]" by HPI. The arbitrator sustained the objection, excluding Hall's amended report, but allowing Hall to testify about the content of that report.

B. *The interim award*

The arbitrator held an evidentiary hearing on the case rate dispute on May 28-29, 2013. The following witnesses testified at the hearing: for Centinela—Dr. Irv. Edwards (the principal for Centinela), Dr. Andrea Brault (an expert); and Roger Brummer (an expert); for HPI—Dr. Daniel Dunkelman (HPI's president); Shridar Ananthan (HPI's chief operating officer); Xochitl Hernandez (a HPI claims manager); Paige Covell (an expert); Robert Farias (a HPI expert); and Hall.[4] A transcript of the hearing does not exist because the hearing was not reported.

The arbitrator issued his written interim award on August 29, 2013. The arbitrator found that "a Case Rate of $350.00 shall apply in this case." In reaching his decision, the arbitrator, inter alia, "read and considered" the following: the briefs submitted by the parties both before and after the arbitration hearing, the testimony of the

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[4] Covell and Farias were not disclosed to Centinela until one week before the arbitration hearing. Although Centinela did not have the opportunity to depose these new experts before the arbitration hearing or retain rebuttal experts, the arbitrator allowed both to testify at the hearing.

witnesses who testified at the hearing, and "the several exhibits admitted at the hearing."[5]

As the arbitrator explained, the decisive difference between the two parties and the strength of their respective positions on the proper case rate was the "credibility" of their witnesses: "The credibility of Centinela's fact and expert

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[5] Because the parties did not have the arbitration hearing reported, we cannot review the testimony of these witness or know which exhibits were admitted into evidence at the hearing. In its appellant's appendix, HPI included documents that, at a glance, appear to be the documents listed on the parties' joint exhibit list. However, this attempt to overcome, at least in part, the absence of a reporter's transcript is unavailing for at least two reasons.

First, without a reporter's transcript, we cannot know for sure which of the documents listed on the joint exhibit list were entered into evidence, let alone what was the testimony about the admitted documents.

Second, our natural reluctance in the absence of a transcript to draw any conclusions about which documents were actually admitted into evidence at the hearing is reinforced by the fact that, at least in one important instance, HPI's appendix does not appear to be an accurate representation of the exhibits admitted at the hearing. "Exhibit 50," which was supposed to include Hall's original and amended reports, but which contained only Hall's original report when transmitted to Centinela prior to the arbitration hearing, now contains only Hall's amended report, the very report that was excluded by the arbitrator on the first day of the hearing.

witnesses was 'head and shoulders' above those of [HPI's] witnesses. Dr. Brault gave compelling testimony in her analysis of the claims by comparing the information available for all claims for services provided to [HPI's] enrollees from 2007 to the present, to industry reference points that were updated annually and took into consideration the 'Gould' factors such as Ingenix and FAIR health [sic]. Mr. Brummer provided compelling evidence of the current prevailing contract case rates in the industry. The testimony of [HPI's] experts, that of, [sic] Covell and Hall, were not compelling and did not support [HPI's] proposed rate when compared to that of Centinela's experts. The Arbitrator did not 'buy' into the testimony and opinions rendered by Ananthan, Covell, Hall or Farias based on their testimony. For reasons set forth by Centinela in its reply/rebuttal brief[6] and based on what was presented at the hearing, none of that evidence was persuasive."

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[6] In its "Closing Brief," dated July 15, 2013, Centinela noted that not only did Hall have no experience with the emergency medicine industry, she "had not looked at any sources to determine what case rates emergency groups were contracting in the Southern California region" and had "very little to no familiarity with the laws and regulations that govern the billing and reimbursement of emergency services provided by noncontracted physicians." Centinela also stated in its closing brief that one of HPI's other experts, Paige, had "no idea" which government agency regulates HPI, did not know what regulations, if any, governed HPI's

The arbitrator further explained that his award was interim in nature "in order to maintain jurisdiction should there be an application or motion for attorney fees and costs."

II. The Attorney Fees Award

On October 14, 2013, Centinela moved for an award of its attorney fees and costs. Centinela sought to recover its attorney fees, not as the prevailing party in the arbitration, but as costs of proof recoverable under Code of Civil Procedure section 2033.420 due to HPI's failure to admit two of Centinela's requests for admission.

Code of Civil Procedure section 2033.420, subdivision (a), in pertinent part, provides as follows: "If a party fails to admit . . . the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees."

The requests for admission at issue were propounded and responded to in September and October 2012, respectively—that is, more than two months before the parties agreed to settle the case rate issue through binding

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reimbursement of emergency physicians, and had never heard of the so-called *Gould* factors.

arbitration and six months before the arbitration. The requests at issue were focused on HPI's compliance with Regulation 1300.71(a)(3)(B)—one request asked HPI to affirm that its Medicare-based fee schedule was not in compliance with Regulation 1300.71(a)(3)(B); the other asked HPI to affirm that it reimbursed every claim in compliance Regulation 1300.71(a)(3)(B). HPI unequivocally denied that that its Medicare-based fee schedule was not in compliance with Regulation 1300.71(a)(3)(B). With regard to its claim-processing practices, HPI admitted in its response that it considered some of the *Gould* factors, such as "the prevailing provider rates in the geographic area where the services were provided," but that it consider other factors, such as the "provider's training, qualifications, and length of time in practice," only if such information was provided to it, and that it was "unaware of any such information" being provided by Centinela.

In its motion, Centinela argued that it was entitled to its fees and costs for two reasons: first, it proved at the arbitration, as evidenced by the arbitrator's award, that HPI's Medicare-based fee schedule was not in compliance with Regulation 1300.71(a)(3)(B); and second, HPI's fact witnesses admitted at the arbitration that HPI failed to consider any of the *Gould* factors when processing claims.

On December 11, 2013, over HPI's opposition, the arbitrator found that "[a]s a result of the position taken by [HPI], [Centinela was] required to litigate the issue [of HPI's compliance with Regulation 1300.71(a)(3)(B)] and to incur

fees and costs in proving [HPI] wrong triggering the instant arbitration. This was the only issue at the arbitration and was thus at the heart of the matter decided." The arbitrator awarded $176,393.50 in attorney fees and $12,740.78 in costs to Centinela.

III. Postarbitration proceedings before the trial court

In March 2014, HPI petitioned the trial court to vacate both the arbitration award and the award of attorney fees and costs. In May 2014, Centinela moved to confirm the awards.

On June 5, 2014, the trial court affirmed the arbitration award in part—it affirmed the award on the merits of the case rate issue, but vacated the award of attorney fees and costs on the ground that the arbitrator lacked the jurisdiction to make such an award.

Both parties timely appealed.

DISCUSSION

I. The Case Rate Award

With regard to the arbitrator's award on the merits, HPI advances three basic arguments. First, HPI contends that the arbitrator made a legal error by looking to the *Gould* factors to determine the proper case rate: "The record of the arbitration reflects [that] the Arbitrator was of the

erroneous opinion that the 'Gould factors' were determinative of a reasonable case rate."[7]

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[7] HPI also asserts that the arbitrator made two other legal errors.

First, HPI argues in conclusory fashion that the arbitrator's award with respect to the case rate conflicts with the Patient Protection and Affordable Care Act (PPACA), title 42 United States Code section 18001 et seq. Specifically, HPI argues that the PPACA either preempts Regulation 1300.71(a)(3)(B) or that "evolving public policies expressed in the PPACA very strong militate against" the use of the *Gould* factors in determining the case rate. HPI does not cite to any particular provision of the PPACA in support of its preemption argument. Nor does HPI cite to *any* case law—state or federal—holding that the PPACA preempts Regulation 1300.71(a)(3)(B) or any similar regulation from another state. HPI's failings in this regard are fatal. A touchstone legal principle governing appeals is that the appellant has the burden to establish prejudicial error "by presenting legal authority on each point made and [¶] factual analysis . . . ; otherwise, the argument may be deemed forfeited. [Citations.] *It is the appellant's responsibility to support claims of error with citation and authority; this court is not obligated to perform that function on the appellant's behalf*." (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656, italics added.) In its reply brief, HPI attempts to overcome its initial failure to support its argument with proper legal authority by quoting selectively from arbitration exhibits, including Hall's amended report, which was not admitted into evidence. An appellant, however, may not simply incorporate by reference arguments made in papers that may or may not have been

Second, HPI contends that the arbitrator's award on the merits was not supported by substantial evidence: "The Arbitrator committed a prejudicial error . . . in adjudging irrelevant and refusing to consider unrefuted evidence establishing HPI consistently, historically reimbursed both

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accepted by the court/arbitrator below, rather than briefing them on appeal. (*Garrick Development Co. v. Hayward Unified School Dist*. (1992) 3 Cal.App.4th 320, 334.) "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v. Berryessa Union School Dist*. (1995) 39 Cal.App.4th 691, 699–700.) Because HPI has failed to properly support its PPACA preemption argument, we decline to address it.

Second, HPI contends that the arbitrator's award conflicts with "Section 2719A of the Public Health Service Act." Because HPI does not provide any citation for this federal statute, we cannot evaluate HPI's argument in a meaningful manner. Moreover, even if HPI did provide the necessary citation, it would be unavailing. While HPI raised this issue in the arbitration, it also simultaneously conceded that this section does not apply in California because balance billing by emergency physicians is prohibited. (See *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497, 502 (*Prospect*).) Because issues that are not "fully developed or factually presented to the trial court" or are "raised and then abandoned in the trial court" cannot be considered on appeal (*Johanson Transportation Service v. Rich Pik'd Rite, Inc*. (1985) 164 Cal.App.3d 583, 588), we decline to consider this issue.

contracting and non-contracting providers at . . . 100%, increased to 120% in 2009 of the prevailing Medicare rate for any services including ER physician services."

Third, HPI claims that the arbitrator abused his discretion by excluding Hall's amended report: "The Arbitrator improperly and without any legal cause excluded a supplemental report of Dona Hall . . . , sustaining [Centinela's] objection [that] the report had not been included in the exchange of exhibits a few days before the arbitration."

As discussed in more detail below, we reject each argument.

A. The arbitrator properly looked to the Gould factors to determine the case rate

1. STANDARD OF REVIEW

Where the parties have agreed to expanded review of their arbitration, we review the arbitration award for legal errors under the de novo standard of review. (*Cable Connection*, *supra*, 44 Cal.4th at pp. 1364–1366; see generally *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2010) 182 Cal.App.4th 503, 511–516.)

2. ANALYSIS

In arguing that the arbitrator committed prejudicial error by looking to the *Gould* factors, HPI relies on *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260 (*Children's Hospital*). HPI's reliance is misplaced.

The dispute in *Children's Hospital*, *supra*, 226 Cal.App.4th 1260, involved the reasonable value of poststabilization emergency medical services provided to Medi-Cal beneficiaries enrolled with Blue Cross during a time when the Blue Cross contract with the hospital had lapsed. Blue Cross paid Medi-Cal rates, but the hospital demanded its full billed charges. (*Id.* at pp. 1264–1265.) The hospital argued that the court could not consider Medi-Cal or Medicare rates accepted by the hospital or "service specific costs" to determine reasonable rates. (*Id.* at p. 1269.) The Court of Appeal held the reasonable value (market value) of the services is not ascertainable from the full billed charges alone. Although the billed charges are relevant to the issue of reasonableness, the jury should consider the range of payments paid to and accepted by the hospital, including amounts paid by the government. (*Id.* at p. 1275.) In other words, *Children's Hospital* held that the *Gould* factors "are not the exclusive measure of value." (*Id.* at p. 1276.)

HPI's reliance on *Children's Hospital*, *supra*, 226 Cal.App.4th 1260, is misplaced for two principal reasons. First, *Children's Hospital* held that "in adopting [Regulation] 1300.71(a)(3)(B), the DMHC established the *minimum* criteria for reimbursement of a claim . . . ." (*Id.* at p. 1273, italics added.) In other words, although a court (or an arbitrator) may consider, depending on the facts of the case, other factors in addition to the *Gould* factors, it must, at a minimum, consider the *Gould* factors: "the payor is *required*

to calculate the appropriate reimbursement based on statistically credible information that takes the *Gould* factors into consideration. If a payor fulfills its claims payment obligation using these criteria, the DMHC will consider the payor compliant with Health and Safety Code sections 1371 and 1371.35."[8] (*Ibid.*, italics added.) The court in *Children's Hospital* repeatedly indicated that its interpretation of Regulation 1300.71(a)(3)(B) is consistent with the DMHC's own interpretation of the regulation: "The DMHC . . . noted that the 'regulations are intended to set forth the *minimum* payment criteria to ensure compliance with the [Knox-Keene] Act's claims payment and dispute resolution standards.'" (*Ibid.*) "[A]s the DMHC explained, in adopting California Code of Regulations, title 28, section 1300.71 it was setting the *minimum* claims payment and dispute resolution standards to ensure compliance with the Knox-Keene Act." (*Id.* at p. 1276, italics added.) Consequently, under *Children's Hospital*, it was entirely appropriate for the arbitrator to consider, at a minimum, the *Gould* factors.

Second, *Children's Hospital*, *supra*, 226 Cal.App.4th 1260, is factually distinguishable from the case at bar in a

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[8] Health and Safety Code sections 1371 and 1371.35 "impose procedural requirements on claim processing and subject health care service plans to disciplinary action and penalties for failure to timely comply with those requirements." (*Children's Hospital*, *supra*, 226 Cal.App.4th at p. 1271.)

number of critical respects and, as the court in *Children's Hospital* emphasized, whatever factors beyond the *Gould* factors are relevant, if any, depends on the facts of that particular case: "the facts and circumstances of the particular case dictate what evidence is relevant to show the reasonable market value of the services at issue . . . . Specific criteria might or might not be appropriate for a given set of facts." (*Id.* at p. 1275.)

Unlike the dispute here, the dispute in *Children's Hospital*, *supra*, 226 Cal.App.4th 1260, involved (a) a plaintiff who was a hospital, not a collection of physicians' groups, (b) patients who were Medi-Cal beneficiaries enrolled in a Medi-Cal managed plan, not commercial patients, i.e., patients in private health care plans, and (c) bills for poststabilization services, not prestabilization emergency services. (*Id.* at pp. 1264–1265.)

The last distinguishing fact may be the most important in determining what are the most relevant factors in determining an appropriate case rate. As explained by the court in *Children's Hospital*, *supra*, 226 Cal.App.4th 1260, there is a significant difference between pre and poststabilization services. Under federal and state law, a "hospital with an emergency department *must* provide a patient with 'an appropriate medical screening examination' and 'such treatment as may be required to stabilize' any emergency medical condition without regard to the patient's insurance or ability to pay. [Citations.] Further, a hospital generally may not transfer or discharge a patient until it has

been determined that the emergency medical condition has been stabilized." (*Id*. at p. 1266, italics added.) However, once the treating provider has determined that the emergency medical condition has been stabilized, a Knox-Keene Plan " 'may require prior authorization as a prerequisite for payment for necessary' " poststabilization medical care" and, if the hospital emergency department or emergency physician fails to obtain prior authorization, the managed care organization " 'may deny reimbursement.' " (*Id*. at p. 1266–1167; see *Prospect*, *supra*, 45 Cal.4th at p. 504; *Bell v. Blue Cross of California* (2005) 131 Cal.App.4th 211, 215–216.)

In other words, because there is more freedom for the doctor with regard to the provision of poststabilization services, it makes more sense, as *Children's Hospital*, *supra*, 226 Cal.App.4th 1260 found, to determine the reasonable value of those services by looking beyond the *Gould* factors to the " 'going rate' for the services" or "the 'reasonable market value at the current market prices.' " (*Id.* at p. 1274.) In contrast, where, as here, the issue is prestabilization emergency services, services over which the provider has little or no discretion to provide, it makes more logical sense to rely predominately on the *Gould* factors.

Children's Hospital, *supra*, 226 Cal.App.4th 1260 is distinguished from the case at bar in another critical respect. The trial court in *Children's Hospital* limited the testimony from the defendant's expert to those opinions based on the six-factor *Gould* test only—that is, the defendant could not

present historical evidence of what was paid, not just billed. (*Id*. at p. 1279.) Here, in contrast, the arbitrator did not prevent HPI from offering evidence about what it had paid for emergency services. As the arbitrator made clear, he considered all of the documents and testimony admitted into evidence and all of the parties' pre and posthearing briefs about the meaning and value of that evidence. In other words, the arbitrator did not commit the same error that the trial court in *Children's Hospital* committed—he did not limit the evidence to only the *Gould* factors.

Because the arbitrator considered all of the evidence presented by the parties—both the provider-centric information derived from the *Gould* factors offered by Centinela and the more market-driven information offered by HPI—we cannot say that the arbitrator committed legal error.

B. HPI's factual challenge to the merits of the arbitration award fails because HPI has not provided an adequate record

HPI challenges the factual basis for the arbitrator's finding that the appropriate case rate is $350, claiming that the arbitrator "rejected," or "disregarded," or "failed to address" or failed to "give any consideration to" or "summarily dismissed" or "ignored" or "refused to consider" various pieces of evidence and that, had the arbitrator not

done so, he would have arrived at a different result.[9] In other words, HPI argues on appeal that the arbitrator's finding with regard to the case rate is not supported by substantial evidence.

1. STANDARD OF REVIEW

" 'When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' [Citations.] [¶] 'It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' " (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) "A fundamental principle of appellate law is the judgment or order of the lower court is presumed correct and the appellant must affirmatively show error by an *adequate* record." (*Parker v. Harbert* (2012) 212 Cal.App.4th 1172, 1178, italics added.)

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[9] On a related note, HPI argues repeatedly that the arbitrator "failed to address" in his interim award various pieces of evidence that supported HPI's case. The problem with this argument is that the arbitrator was under no obligation to discuss every piece of evidence offered by either side in his written statement of decision; he was merely obligated to "state the factual and legal grounds for the decision," which he did.

2. ANALYSIS

As the party with the burden of proof, HPI must establish no substantial evidence supports the arbitrator's factual finding. HPI, however, cannot meet its burden of proof. We have no reporter's transcript or any other objective means to determine what exact evidence the arbitrator heard and received. As a result, we cannot determine whether the arbitrator's decision about the case rate was or was not supported by substantial evidence. Moreover, we cannot presume that the arbitrator erred; indeed, as noted above we must presume the very opposite—that is, we must presume the arbitrator's decision was supported by substantial evidence. " 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent . . . .' " (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.)

HPI's failure to provide an adequate record "requires that the issue be resolved against [it]." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) As explained by our Supreme Court, when a defendant "elect[s] not to provide a reporter's transcript of the trial proceedings," we must "reject" the defendant's claim because he "failed to provide this court with a record adequate to evaluate this contention." (*Aguilar v. Avis Rent A Car System, Inc*. (1999) 21 Cal.4th 121, 132; *Boeken v. Philip Morris Inc*. (2005) 127 Cal.App.4th 1640, 1671–1672 [no transcript of judge's ruling on jury instruction request];

Hodges v. Mark (1996) 49 Cal.App.4th 651, 657 [affirming nonsuit due to "omission" of reporter's transcript].)

Accordingly, we affirm the arbitrator's finding that the case rate is $350.

C. HPI's challenge to the arbitrator's exclusion of Hall's amended report fails because HPI has not provided an adequate record

1. STANDARD OF REVIEW

"In determining the admissibility of evidence, the trial court has broad discretion. . . . [Citation.] . . . [Citations.] On appeal, a trial court's decision to admit or not admit evidence, whether made *in limine* or following a hearing . . . is reviewed only for abuse of discretion." (*People v. Williams* (1997) 16 Cal.4th 153, 196–197.) "A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) "The trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a 'miscarriage of justice'—that is, that a different result would have been probable if the error had not occurred." (*Zhou v. Unisource Worldwide, Inc*. (2007) 157 Cal.App.4th 1471, 1480; see Evid. Code, § 354; Code Civ. Proc., § 475.)

HPI cannot meet its burden here, because it has failed to provide an adequate record of the proceeding below related to the exclusion of Hall's amended report.

2. ANALYSIS

At first blush, we might be inclined to agree with the trial court that the arbitrator did not abuse his discretion in excluding Hall's amended report because "the report is dated four days before the scheduled arbitration, HPI turned the report over on the day of the scheduled arbitration depriving [Centinela] of the opportunity to review the report, depose Hall and/or retain rebuttal expert), and . . . , the Arbitrator allowed Hall to testify regarding the opinions set forth in the *amended* report." However, on the record before us, we simply do not have sufficient information to evaluate HPI's argument meaningfully.

In a wide array of situations, not just trials, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of the pertinent proceeding (or a suitable substitute) was provided. (See, e.g., *Vo v. Las Virgenes Municipal Water Dist*. (2000) 79 Cal.App.4th 440, 447 [attorney fees award hearing]; *Walker v. Superior Court* (1991) 53 Cal.3d 257, 273–274 [transfer order]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574–575 (lead opn. of Grodin, J.) [new trial motion hearing]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [hearing to determine whether counsel was waived]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [surcharge hearing]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [monetary sanctions hearing]; *Buckhart v. San Francisco Residential Rent etc,. Bd*. (1988) 197 Cal.App.3d 1032, 1036 [hearing on Code Civ. Proc., § 1094.5 petition]; *Sui v. Landi* (1985) 163

Cal.App.3d 383, 385–386 [motion to dissolve preliminary injunction hearing]; and *Wetsel v. Garibaldi* (1958) 159 Cal.App.2d 4, 10 [order confirming arbitration award].)

As explained by the court in *Vo v. Las Virgenes*, *supra*, 79 Cal.App.4th 440, an affirmance is required where "the record provided by defendant is inadequate to conclude the trial court abused its discretion . . . . As the party challenging a fee award, defendant has an affirmative obligation to provide an adequate record so that we may assess whether the trial court abused its discretion. [Citations.]. . . . The absence of a record concerning what actually occurred at the trial precludes a determination that the trial court abused its discretion. It is not possible to judicially and appropriately determine from the inadequate record provided by defendant that the trial court abused its discretion . . . ." (*Id*. at pp. 447–448.)

Here, because we have no reporter's transcript of the proceedings regarding the exclusion of Hall's amended report, because we have no independent, objective record of what the arbitrator was told about Hall's amended report and related matters, and the reasons offered by the arbitrator for his decision, we have no basis upon which to determine whether the arbitrator abused his discretion by acting irrationally or arbitrarily.

Accordingly, we affirm the arbitrator's decision to exclude Hall's amended report.

II. The Attorney Fees Award

Centinela argues that the arbitrator did not exceed his powers in awarding Centinela its costs of proof, because the decision on the cost of proof was "inextricably intertwined" with the arbitrator's decision on the merits. We are unpersuaded by Centinela's argument.

1. STANDARD OF REVIEW

We review the trial court's determination whether an arbitrator exceeded his powers de novo and give "substantial deference to the arbitrator's own assessment of his contractual authority." (*Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert* (2011) 194 Cal.App.4th 519, 528.)[10]

2. ANALYSIS

"[A]rbitration is a matter of contract and an arbitrator may consider *only* such disputes as are covered by the arbitration clause or by a superseding submission agreement." (*Mansdorf v. California Physicians' Service, Inc.* (1978) 87 Cal.App.3d 412, 417, italics added.) In other words, "a party cannot be required to arbitrate a dispute he has not agreed to submit." (*Pacific Inv. Co. v. Townsend* (1976) 58 Cal.App.3d 1, 9.) Although California has a strong policy favoring the enforcement of valid arbitration

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[10] Here, the arbitrator did not assess his contractual authority to award Centinela its costs of proof. The arbitrator elected not to address his authority to make such an award even though HPI briefed the issue, arguing that he had no such contractual authority.

agreements, that policy is not without limits. " '[T]he policy favoring arbitration cannot displace the necessity for a voluntary *agreement* to arbitrate.' " (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 739.)

"As a contractual matter between the parties involved, the arbitrator 'derives his power solely from the arbitration agreement and he cannot exceed his derived powers. "There is indeed a strong policy in favor of enforcing agreements to arbitrate, but there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate . . . [citation]" . . . . [¶] "The powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission." ' " (*Pacific Crown Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138, 1144; see *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8.)

Here, the scope of the parties' arbitration agreement is quite narrow. The agreement provides as follows: "The parties will enter into a binding arbitration to determine a case rate for commercial claims only to apply for commercial claims with dates of service of January 14, 202 through December 10th, 2015." The parties could have agreed to arbitrate the case rate for the applicable period plus "any controversy arising out of or relating to the determination of that case rate," but they did not. In other words, there is nothing in the text of the parties' arbitration agreement stating or even suggesting that they agreed that the arbitrator had power to award fees and costs under any and all circumstances. Nor is there anything in the record before

us establishing or even suggesting that the parties subsequently amended their arbitration agreement such that the arbitrator's authority included the award of attorney fees and costs under any and all circumstances. In fact, the only reference to an award of attorney fees in the arbitration agreement is when there is a subsequent billing/accounting dispute *after* the case rate has been determined. The fact that the parties were very selective in granting the arbitrator authority to award attorney fees and costs further reinforces the conclusion that the arbitrator did not have the authority to award such fees and costs in connection with the determination of the case rate.

Moreover, "[w]hen parties contract to resolve their disputes by private arbitration, their agreement ordinarily contemplates that the arbitrator will have the power to decide any question of contract interpretation, historical fact or general law *necessary* . . . to reach a decision." (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1184, italics added.) An award of Centinela's costs of proof, while "intertwined" with the case rate controversy, was not "necessary" to reach a decision on the proper case rate.

Because the parties' express definition of the issue to be decided by binding arbitration is not susceptible of an interpretation permitting the arbitrator to award costs of proof—because HPI did not voluntarily agree to include in the arbitration an award for cost of proof—we affirm the trial court's decision to vacate that part of the arbitration award.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.